

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2003-343-C – ORDER NO. 2004-174
AUGUST 10, 2004

IN RE: Rule To Show Cause Against Delta Phones,)	ORDER
Inc. and E Z Talk Communications, LLC.)	GRANTING REQUEST
)	FOR PROTECTIVE
)	ORDER AND
)	PROTECTIVE ORDER

This matter comes before the Public Service Commission of South Carolina (“Commission”) upon the Request of BellSouth Telecommunications, Inc. (“BellSouth”) for a Protective Order. BellSouth’s Request results from a Subpoena Duces Tecum which was served by the Commission upon BellSouth requesting that certain information relative to the present case be provided to the Commission. BellSouth asserts in its Request that the information that is responsive to the subpoena is proprietary in nature, and BellSouth is required “to protect the confidentiality of proprietary information of, and relating to, other telecommunications carriers...and customers....” *See* 47 U.S.C. §222(a).

The Commission has determined that the Request should be granted and hereby adopts the following Protective Order.

Pursuant to Rule 26(c) of the South Carolina Rules of Civil Procedure and Regulation 103-854, and in order to facilitate the prompt resolution of disputes over

confidentiality, to adequately protect material entitled to be kept confidential, and to ensure that the protection is afforded to material so entitled, the Public Service Commission of South Carolina (“Commission”) hereby orders that:

1. **Exchange of Confidential Information.** Any party to this docket shall be entitled to seek enforcement of (or other appropriate relief pertaining to) this Protective Order before the Commission, or any other authority having competent jurisdiction, for any breach or threatened breach of this Protective Order. This Protective Order shall control the production and disclosure of all materials deemed “Confidential Information” pursuant to paragraph 2 below.

2. **Confidential Information.**

(a) Any materials generated or provided by a party, or by a person or entity responding to a subpoena issued by a party of the Commission Staff, may be designated as “Confidential Information” by that party if the party believes in good faith that the materials are confidential or proprietary and are entitled to protection from disclosure under any provision of South Carolina or Federal law, or are subject to existing non-disclosure obligations to a third party. The designation of materials as “Confidential Information,” or the failure to designate materials as “Confidential Information,” shall in no way affect the right of the producing party to challenge the release of such materials by the United States in response to a request pursuant to the Freedom of Information Act, 5 U.S.C. § 552, *et seq.*, or the State of South Carolina in response to a request pursuant to the South Carolina Freedom of Information Act, S.C. Code Ann. §30-4-10 *et seq.* Any party asserting confidentiality for such material shall so indicate by clearly marking each

page, or portion thereof, for which a Confidential Information designation is claimed with a marking or markings that are reasonably calculated to alert custodians of the material to its confidential or proprietary nature. Except with the prior written consent of the party or other person who has designated a document to be stamped as Confidential Information, or as hereinafter provided, no Confidential Information may be disclosed to any person. For purposes of the Protective Order, the term “document” means all written, recorded or graphic material, and non-paginated items such as computer tapes, diskettes, and CD ROMs, whether produced or created by a party or another person, whether produced pursuant to the Commissioner’s rules, subpoena, by agreement or otherwise. Interrogatory answers, responses to requests for admission, deposition transcripts and exhibits, pleadings, motions, affidavits, and briefs that quote, summarize, or contain materials entitled to protection are accorded status as a stamped confidential document, and to the extent feasible, shall be prepared in such a manner that the Confidential Information is bound separately from that not entitled to protection. Confidential Information produced in electronic form shall be on CD ROMs or floppy disks in a format that is acceptable and viewable by the receiving party(ies) using one or more Microsoft Office application or an Adobe Reader.

(b) Notwithstanding Section 2(a) above, “Confidential Information” shall not include information that: (i) is already known by the party receiving the information free from any non-disclosure obligation; (ii) is or becomes publicly known through no wrongful act of the receiving party or any party subject to this Protective Order; (iii) is rightfully received from a third party without restriction and without violation of this

Protective Order; or (iv) information that is independently developed by a party without using any Confidential Information of any party to this Protective Order.

3. **Permissible Disclosure of Confidential Information.**

(a) Notwithstanding paragraph 2, Confidential Information provided pursuant to this Protective Order may be disclosed without prior written consent only to the following persons, only in prosecuting this Proceeding, and only to the extent necessary to assist in prosecuting this Proceeding:

(1) Counsel of record representing a party in this Proceeding and any legal support personnel (e.g., paralegals and clerical employees) employed or engaged by such attorneys, and other employees, officers, or directors of a party.

(2) Consultants or experts retained by a party, who are not currently involved in the marketing, procurement, manufacturing, pricing, development of payphone services, equipment, or software. Individuals who become reviewing representatives under this paragraph may not use the Confidential Information made available in this Proceeding to plan, develop, or market any payphone services, equipment, or software. Nor may individuals who become reviewing representatives under this paragraph use the Confidential Information to engage or consult in the marketing, procurement, manufacturing, pricing, or development of any payphone services, equipment, or software.

(3) The Commission or its staff.

(4) Court reporters, stenographers, or persons operating audio or video recording equipment at hearings or depositions.

(5) Any person designated by the Commission in the interest of justice, upon such terms as the Commission may deem proper.

(6) Persons noticed for depositions or designated as witnesses, to the extent reasonably necessary in preparing to testify or for the purpose of examination in this Proceeding.

(7) Subject to Section 7 below, a court, regulatory agency or other government body of competent jurisdiction when compelled by such court, agency or government body.

(b) Persons obtaining access to Confidential Information under this Protective Order shall not disclose information designated as Confidential Information to any person who is not authorized under this section to receive such information, and shall not use the information in any activity or function other than in prosecuting this Proceeding before the Commission or any arbitrator appointed by this Commission. Each individual who is provided access to Confidential Information pursuant to sections (a)(2), (a)(5), or (a)(6) of this paragraph, must first sign, and have notarized, a statement affirmatively stating that the individual has reviewed this Protective Order and understands and agrees to be bound by the limitations it imposes on the signing party. The form of the notarized statement to be used is attached as Attachment A to this Protective Order.

(c) No copies or notes of materials marked as Confidential Information may be made except copies or notes to be used by persons designated in section (a) of this paragraph. Each party shall maintain a record of the persons to whom the copies of Confidential Information have been provided. Any note memorializing or recording of

Confidential Information shall, immediately upon creation, become subject to all provisions of this Protective Order.

(d) Within ninety (90) days of termination of this Proceeding, including all appeals and petitions, all originals and reproductions of Confidential Information, along with the log recording persons who received copies of such materials, shall be returned to the producing party or destroyed by the receiving party upon written request of the producing party. In addition, upon such termination, any notes or other work product, derived in whole or in part from the Confidential Information, shall be destroyed, and counsel of record for the receiving party shall notify counsel for the party who produced the materials in writing that this has been completed. If materials are destroyed rather than returned to the producing party, a sworn statement to that effect by counsel of record for the receiving party shall be provided to the producing party. A limited exception to the provisions of this section is recognized for the Commission wherein the Commission shall be allowed to retain, under seal, one copy of all Confidential Information for purposes of preserving the official record of the Commission. Further, all Commission staff notes or work product shall be accumulated and kept under seal with all other confidential information which compiles the official record of the Commission.

(e) Before disclosing a document marked as Confidential Information to any person listed in subparagraph 3(a)(5) or (a)(6) who is a competitor (or an employee or officer of a competitor) of the party, including a third party, that so designated the document, the party wishing to make such disclosure shall give at least ten (10) days advance notice in writing to the counsel who designated such information as

Confidential, stating the names and address of the person(s) to whom the disclosure will be made, identifying with particularity the documents to be disclosed, and stating the purposes of such disclosure. If, within the ten (10) day period, a motion is filed objecting to the proposed disclosure, a disclosure is not permissible unless and until the Commission has denied such motion.

(f) The number of reviewing representatives designated by a party to review Confidential Information under sections (a)(2) of this paragraph may not exceed twenty (20) individuals (excluding paralegals and clerical employees) unless (i) the party producing the Confidential Information, and any third party whose Confidential Information is being disclosed, consent to additional reviewing representatives, or (ii) the Commission denies a motion to bar disclosure of the Confidential Information to additional reviewing representatives. Failure to file such a motion within ten (10) days after receiving written Notice that a reviewing party intends to designate additional reviewing representative(s) shall constitute consent to the designation. The written Notice shall (a) identify the additional reviewing representative(s), (b) identify the Confidential Information that is proposed to be disclosed, and (c) provide the current employment and position of the proposed additional reviewing representative(s). If within five (5) days after this list is supplied to opposing parties, a motion is made objecting to the proposed disclosure, disclosure is not permissible unless and until the Commission had denied the Motion. For any additional reviewing representatives, the parties must serve notice as specified above.

4. **Declassification.** A party may apply to the Commission for a ruling that documents, categories of documents, deposition transcripts, stamped or designated as confidential, are not entitled to such status and protection. The party or other person that designated the document or testimony as Confidential Information shall be given notice of the application and an opportunity to respond.

5. **Confidential Information Offered in Evidence or Filed in the Record.** Subject to the Commission's rules and applicable state statutes, Confidential Information may be offered into evidence or in the record made by the parties and submitted to the Commission (or to an arbitrator appointed by the Commission) in this Proceeding, provided that the proponent does so in the manner set forth in this Protective Order and provides reasonable advance written notice of the party's intent to do so. Pursuant to this Protective Order, any party may move before the Commission for any order that the evidence be received in camera or under other conditions to prevent unnecessary disclosure. The Commission will then determine whether the proffered evidence should continue to be treated as Confidential Information and, if so, what protection, if any, may be afforded such information at any hearing or other proceeding.

6. **Subpoena by Courts or Other Agencies.** If a court or other administrative agency subpoenas or orders production of Confidential Information that a party has obtained under the terms of this Protective Order, such party shall promptly (within two (2) business days) notify the party (or other person who designated the document as confidential) of the pendency of such subpoena or order to allow that party time to object to that production or seek a protective order.

7. **Filing.** Confidential Information need not be filed with the Commission except when required in connection with motions under the Commission's rule and regulations or other matters pending before the Commission. If filed, such information shall be filed under seal and shall remain sealed while in the Commission's office so long as they retain their status as Confidential Information.

8. **Client Consultation.** Nothing in this Protective Order shall prevent or otherwise restrict counsel from rendering advice to their clients and, in the course thereof, relying generally on examination of Confidential Information provided, however, that in rendering such advice and otherwise communicating with such client, counsel shall not make specific disclosure or reference to any Confidential Information except under the procedures of paragraph 3 above.

9. **Use.** Persons obtaining access to Confidential Information under this Protective Order may use the information only for preparation of and the conduct of litigation in this Proceeding and any related appeals or review proceedings, and may not use such information for any other purpose, including business or commercial purposes, or governmental or other administrative or judicial proceedings.

10. **Non-Termination.** The provisions of this Protective Order shall not terminate at the conclusion of this Proceeding.

11. **Modification Permitted.** Nothing in this Protective Order shall prevent any party from objecting to discovery that it believes to be otherwise improper.

12. **Responsibilities of the Parties.** The parties are responsible for employing reasonable measures to control, consistent with this Protective Order, duplication of, access to, and distribution of Confidential Information.

13. **Definition of “this Proceeding”.** For the purposes of this Protective Order, the phrase, “this Proceeding” shall only include South Carolina Public Service Commission Docket No. 2003-343-C and appeal thereof.

14. **Damages.** Because the Third-Party Confidential Information represents substantial commercial value to the current and future business of the third parties, the parties agree that any material disclosure of the third party Confidential Information would result in substantial damages to the commercial operations of the third parties. In the event that third party Confidential Information is disclosed in violation of this Protective Order by any employee, agent, attorney, expert or consultant for a party to this Protective Order, then such party agrees that it will be liable for the payment of any damages actually incurred by the producing party that are proximately caused by the violation and finally awarded to the producing party by a court of competent jurisdiction. It is further agreed that if any provision of this Protective Order shall contravene any statute or constitutional provision or amendment either now in affect or which may, during the term of this Protective Order be enacted, then that conflicting provision in the Protective Order shall be deemed null and void with respect to the Commission. The parties agree to submit to the jurisdiction of state or federal courts within the State of South Carolina, but understand that the sole remedy for the settlement of damage claims

against the South Carolina Public Service Commission arising from this Protective Order shall be limited to those measures permitted by South Carolina law.

15. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

/s/
Randy Mitchell, Chairman

ATTEST:

/s/
G. O'Neal Hamilton, Vice Chairman

(SEAL)